

Deputy Attorney General Details New Policy of Criminal Liability for Companies and Employees

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PRACTICES Labor and Employment

The Department of Justice continues to underscore its policy to prosecute individuals in corporate cases. Following the DOJ's controversial September 2015 mandate instructing federal attorneys to prosecute individual employees in addition to companies, Deputy Attorney General Sally Quillian Yates defended the position at the New York City Bar Association White Collar Criminal Law Committee Conference on May 10, 2016. Yates focused on the parts of the so-called "Yates Memo" that involve privileged communications in response to worries and criticisms from corporations.¹

Yates attempted to assuage concerns regarding disclosure of privileged information. The Yates Memo instructs prosecutors to only give corporations cooperation credit if "all relevant facts" relating to individuals who participated in alleged crimes are turned over. This instruction raised issues regarding privileged information and whether corporations may still receive cooperation credit without revealing information that could otherwise be legally withheld under the attorney-client privilege.

Yates clarified that this policy relates specifically to facts, not communications writ large. If any facts were truly privileged, Yates suggested they be brought to the prosecutor's attention for evaluation. While this may still be troubling for many companies and individuals who are under investigation, Yates suggested that there is no blank check for access to attorney-client communications. Yates even went as far as to urge companies to report prosecutors who force waiver of privileges to her office. However, Yates noted that the DOJ plans to increase prosecution of individuals within companies and that investigations into individual culpability will begin at the early stages of probes. Taken together, when a corporation does want cooperation credit, it must be aware that more information will be turned over to the DOJ. Therefore, its employees may be at further risk for liability and it may be pushed to defend the applicability of privileged information being withheld.

Companies and individuals should therefore be prepared as the DOJ is taking its increased disclosure requirements seriously. Individuals within corporations should not depend on the rules of privilege to shield themselves from prosecution.

¹ See Haynes Boone's previous [alert](#) on this topic.